**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPLICATION NO.3078 OF 2001
[LEAVE TO FILE APPEAL]
IN
CRIMINAL APPEAL NO. OF 2001

Shri.Bindbasaniprasad Hublal Shukla. ..Applicant.
Versus
The State of Maharashtra and Anr. ..Respondents.

..
Mr.Nitin V. Gangal, Adv. for the Applicant.
Ms.P.H.Kantharia, APP, for the State.
..

**CORAM : SMT.V.K.TAHILRAMANI,J.**
**DATED : DECEMBER 07, 2007.**

P.C.:

. Leave to amend. Amendment to be carried out forthwith.

1. Heard the learned Advocate for the Applicant and the learned APP for the State. The office noting shows that the 2nd Respondent is duly served with the notice. None appears for the 2nd respondent.

2. The applicant is the complainant in a complaint under Section 138 of N.I. Act, 1881. By order dated 28th June, 2001, the learned Additional Chief Metropolitan Magistrate, 5th

Court, Dadar, Mumbai, dismissed the complaint by exercising the power under Section 256 of the Code of Criminal Procedure, 1973 which has resulted in acquittal of the 2nd respondent.

3. Shri.Gangal appearing for the applicant submitted that only on few occasions the applicant (complainant) could not remain present. He pointed out that on various dates in the said case, the 2nd respondent was not present and therefore, warrant came to be issued against the respondent-accused. Mr.Gangal submitted that in such case the learned Magistrate ought to have given one more opportunity to the applicant.

4. I have also perused roznama. From the roznama it is seen that on 13th August, 1998, 4th February, 1999 and 29th June, 1999 the applicant was present. However, the case was adjourned as the warrant issued against the respondent was not executed. On 6th January, 2000 though the applicant’s advocate was present, the applicant was not present. On that date the case was adjourned as warrant issued against the 2nd

respondent was not executed. On the next date i.e. on 20th April, 2000 the applicant was not present. However, his advocate was present. The trial Court issued fresh bailable warrant against the 2nd respondent on that day. On 1st August, 2000, though the applicant was not present, he was represented by his advocate. The Court issued a fresh bailable warrant against the 2nd respondent on that day. The case was adjourned to 16th November, 2000. On that day the applicant was present. The 2nd respondent was present and the learned trial Judge cancelled the warrant issued against the 2nd respondent. On 8th March, 2001 and 28th June, 2001, the applicant was absent and that is the reason why the order under Section 256 of the said Code has been passed by the learned trial Judge.

5. A perusal of the roznama shows that the applicant was diligently prosecuting the complaint. On the earlier dates the complaint could not proceed as the 2nd respondent was repeatedly absent and warrants were required to be issued against him. In my view, the learned trial

Judge ought to have granted one more opportunity to the applicant to remain present and to prosecute the complaint. The order impugned deserves to be set aside and the complaint will have to be restored.

6. Hence the following order is passed :

(i) The impugned order dated 28th June, 2001 is quashed and set aside and the complaint C.C. No.475/S of 1997 is restored to the file of the learned Additional Chief Metropolitan Magistrate, 5th Court, Dadar, Mumbai.

(ii) The learned trial Judge will issue notice to the 2nd respondent of the date fixed in the said complaint.

(iii) Application is accordingly allowed.

(iv) Writ to be sent immediately.

**(SMT.V.K.TAHILRAMANI,J.)**